

# **WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES DECEMBER, 2013**

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following county:

Door  
Milwaukee  
Sauk  
Winnebago

## **WEDNESDAY, DECEMBER 18, 2013**

9:45 a.m.	2012AP122	-	Anthony Gagliano & Co., Inc. v. Openfirst, LLC, et al.
10:45 a.m.	2012AP5	-	CED Properties LLC v. City of Oshkosh
1:30 p.m.	2012AP337-CR	-	State v. Muhammad Sarfraz

## **THURSDAY, DECEMBER 19, 2013**

9:45 a.m.	2012AP1869	-	Richard S. Wilcox v. Estate of Ralph Hines
10:45 a.m.	2011AP1514	-	Robert L. Kimble v. Land Concepts, Inc., et al.

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT**  
**WEDNESDAY, DECEMBER 18, 2013**  
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Dennis P. Moroney, presiding.*

2012AP122

[Anthony Gagliano & Co. v. Openfirst](#)

In this case, the Supreme Court examines whether Wisconsin law allows a landlord of commercial property to recover unpaid rent, not only from a defaulting tenant, but also from that tenant's temporary sub-tenant.

The Court of Appeals reversed a circuit court order dismissing the claim of landlord Anthony Gagliano & Co. (Gagliano), Inc. against Quad Graphics, New Electronic Printing Systems, LLC, Openfirst, LLC, and Robert Kraft, in connection with space leased from Gagliano.

Some background: In May of 2000, Gagliano entered a lease agreement with Electronic Printing Systems, Inc. as tenant for two spaces at 300 N. Jefferson St. in Milwaukee. Kraft operated Electronic Printing Systems under the business name Openfirst.

The lease was to expire on June 23, 2006 for one space and another was set to expire six years after the tenant took occupancy. The lease provided that the tenant and all guarantors of the lease "shall remain fully liable under this lease and their guarantees, respectively, despite any sublease or assignment."

Over several years, a series of transactions occurred affecting ownership of Electronic Printing Systems, the lease and associated loan agreements.

In November 2002 the assets of Electronic Printing Systems, Inc. and Openfirst, Inc. were sold to New Electronic Printing Systems, and Gagliano's leases with the original Electronic Printing Systems and Openfirst were assumed by the new entity. Ownership of New Electronic Printing Systems eventually transferred to Quad Graphics as part of a larger transaction.

Some of these transactions affected assignment of the leases and what may happen in the event of a loan default.

New Electronic Printing Systems struggled, and on Sept. 1, 2008, it provided notice to Gagliano that it intended to vacate and surrender the premises on or before Oct. 31, 2008. Both New Electronic Printing Systems and Quad Graphics vacated the premises. Gagliano was fully compensated for the period of their actual occupancy.

On Dec. 8, 2008, Gagliano filed suit for breach of the lease against New Electronic Printing Systems, Openfirst, LLC, and various predecessor tenants and guarantors for rent for the remainder of the extended lease term.

Gagliano subsequently amended its complaint to add Quad Graphics, among others, as a defendant.

The amended complaint advanced two alternate theories of liability against Quad Graphics: (1) that Quad Graphics was directly liable as the assignee of the leases; and (2) that Quad Graphics was acting as New Electronic Printing Systems' and Openfirst, LLC's alter ego.

Quad Graphics moved for summary judgment on both of Gagliano's claims, arguing it was not an assignee and that Gagliano had waived any right to assert an alter ego claim. The circuit court granted Quad Graphics' motion and dismissed all of Gagliano's claims against it.

The remaining parties went to trial in July of 2011. After Gagliano rested its case, the circuit court ruled as a matter of law that Gagliano had failed to properly serve its notice of lease extension on New Electronic Printing Systems. The court dismissed all claims relating to the extended lease period. The remaining issues went to the jury, which returned a verdict in favor of the defendants. Gagliano appealed.

The Court of Appeals reversed, remanding for further proceedings including, if appropriate, a determination and apportionment of damages. Quad Graphics has appealed to the Supreme Court, contending there is a fundamental difference between an assignee and a subtenant that makes a difference in this case.

Quad Graphics says while in general, a landlord may recover unpaid rent from a tenant's assignee, it may not recover unpaid rent from a subtenant. Gagliano argues because Quad Graphics occupied the premises as an assignee of New Electronic Printing Systems' leases, Quad Graphics was obligated to pay rent as long as it was entitled to occupy the premises.

**WISCONSIN SUPREME COURT  
WEDNESDAY, DECEMBER 18, 2013  
10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Judge Thomas J. Gritton, presiding.*

2012AP5

[CED Properties v. City of Oshkosh](#)

This case involves a challenge to a special assessment levied by the city of Oshkosh against a property owner for portions of a road construction project at the corner of Jackson Street and Murdock Avenue. The Supreme Court examines notice pleadings and the “relation back” statute -- Wis. Stat. § 802.09(3).

Relation back doctrine provides that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time.

Some background: Property owner CED Properties filed a lawsuit challenging the constitutionality of a \$19,241.73 special assessment for concrete paving. It turned out that the City was actually assessing CED \$38,646.66 – \$19,241.73 relating to the Murdock Avenue portion of the project, and \$19,404.93 relating to the Jackson Street portion.

CED said it was unaware of special assessment for the Jackson Street portion of the project until the discovery phase of its initial legal challenge. CED asked the court to find the special assessment void and unenforceable, and it filed an amended complaint relating to the Jackson Street portion of the property.

The city admitted it did not comply with the requisite statutory procedural steps and consented to summary judgment that the assessment referenced in CED’s original complaint was null and void. However, the city argued that CED’s claim regarding the Jackson Street special assessment was untimely since it was not filed within the 90-day period set forth in § 66.0703(12)(a), Stats.

The circuit court ruled in favor of the city. A divided Court of Appeals’ affirmed, concluding that although the notice pleading and relation back statutes applied, they did not save CED’s claim.

The Court of Appeals said CED’s original complaint failed to identify a claim related to the Jackson Street special assessment because it failed to set forth basic facts giving rise to that claim. It said the notice of appeal indicated only that CED was appealing “the special assessment as further described in the complaint” and the only special assessment described was the \$19,241.73 special assessment related to the Murdock Avenue portion of CED’s property. The Court of Appeals also rejected CED’s alternate claim that its Jackson Street assessment claim in the amended complaint related back to the original complaint and was therefore timely. The court concluded as argued by the city that the city levied two special assessments, one related to Murdock Avenue and one related to Jackson Street.

Court of Appeals Judge Paul F. Reilly dissented, concluding that CED appealed the assessment of the entire Jackson Street – Murdock Avenue intersection improvement project. Reilly said CED’s appeal clearly also included the portion of the assessment for the Jackson Street part of the property, noting the original complaint gave notice of an appeal of the “special assessment” for the “Jackson Street – Murdock Avenue intersection improvement project.”

Reilly said the confusion inherent in the original complaint was directly attributable to the city's failure to prepare the proper report as required by § 66.0703(5). Reilly noted that under Wisconsin's liberal notice pleading rule, all pleadings shall be construed to do substantial justice, and a complaint must be read most favorably to the plaintiff.

**WISCONSIN SUPREME COURT**  
**WEDNESDAY, DECEMBER 18, 2013**  
**1:30 p.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl presiding.*

2012AP337-CR

[State v. Sarfraz](#)

This case examines Wis. Stat. § 972.11(2)(b)1, a provision in the state's Rape Shield Law, and the possible relevance of a complainant's alleged prior sexual conduct to the defendant's case. Wis. Stat. § 972.11(2)(b)1 provides that a complainant's sexual history with the defendant may be sufficiently probative of a material issue to overcome the prejudicial nature of such evidence.

Some background: Muhammad Sarfraz was convicted after a jury trial of second-degree sexual assault by use of force in the woman's apartment on May 15, 2010.

There's no dispute that Sarfraz and the woman knew each other and that the woman and her father had lived with Sarfraz and his wife after the woman and her father immigrated to the United States. It's also not disputed that the woman and her father eventually moved out to their own apartment. However, the facts surrounding the incident on May 15, and the nature of the prior relationship between the woman and Sarfraz, are very much in dispute.

The woman said Sarfraz entered her apartment while masked and armed with a knife. She said she immediately recognized Sarfraz after pulling off the mask during a struggle that resulted in property damage and bloody injuries to both Sarfraz and the woman. Police were eventually called by neighbor who found the woman partially clothed and bloodied in the apartment hallway. She told the neighbor she had been raped. Police arrested Sarfraz after stopping the taxi he was driving. The arresting officers reported a laceration on the right side of Sarfraz's face and the recovery of a bloody knife from the taxi.

After pleading not guilty, but prior to the commencement of his jury trial, Sarfraz filed a motion to admit evidence of prior consensual sexual activity between he and the victim. He contended the evidence would support his defense that the sexual activity on May 15, 2010, was consensual and that the two had a romantic relationship prior to the date of the alleged assault.

The trial court held a pretrial evidentiary hearing on Sarfraz's motion during which Sarfraz and the woman told dramatically different stories.

Sarfraz said that he and the woman often engaged in "fondling and touching and all that stuff," including masturbation, but not intercourse. He said that his wife knew about the relationship with the woman and demanded the woman and her father move out. Sarfraz said the sexual relationship continued after the woman and her father moved into their own apartment.

The woman testified that she never had a romantic relationship with Sarfraz and never engaged in any sexual or physical activity with him. She stated that she and her father moved out of Sarfraz's apartment because her father found a job, not because Sarfraz's wife demanded that they leave. She also stated that before the alleged assault, the only time Sarfraz came to her apartment was to help her move.

The trial court ruled that Sarfraz could not offer detailed evidence of the alleged prior sexual relationship. Because of the trial court's ruling, Sarfraz was not allowed to describe

during trial the details of the sexual contact they allegedly shared. He portrayed the woman as the initiator of both the violence and the sexual activity that occurred on May 15. Sarfraz stated that he did not attempt to conceal his identity, but rather knocked on the door and the woman opened it when she recognized his voice.

Sarfraz was sentenced to 10 years of incarceration and five years of extended supervision. He filed a motion for post-conviction relief, alleging ineffective assistance of counsel and entitlement to a new sentence. The trial court denied the motion in a written decision.

Sarfraz successfully appealed, arguing that the trial court erroneously barred evidence of the woman's prior sexual conduct with him.

The Court of Appeals ruled that the probative value of the prior sexual contact was high because that evidence allowed the jury to question the woman's possible motivations and credibility, and to question whether it was implausible that Sarfraz would have had to trick his way into the apartment.

The state appealed to the Supreme Court, arguing:

- that the Court of Appeals' decision runs afoul of the governing statutory and case law by instructing Wisconsin trial judges to presume high probative value and low prejudicial impact of a sexual assault victim's sexual history when the law dictates the opposite;
- that the Court of Appeals gave insufficient deference to the trial court's discretionary evidentiary decision.
- that the Court of Appeals did not address the state's harmless error argument; i.e., that even assuming it was error to exclude Sarfraz's testimony about the alleged prior acts of consensual masturbation, it was harmless error due to the overwhelming physical and testimonial evidence against Sarfraz.

**WISCONSIN SUPREME COURT**  
**THURSDAY, DECEMBER 19, 2013**  
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Sauk County Circuit Court decision, Judge James Evenson, presiding.*

2012AP1869

[Wilcox v. Est. of Hines](#)

This case involves a dispute over the ownership of a 25-foot wide strip of land along the shore of Lake Delton. The Supreme Court examines an apparent inconsistency in case law that has developed under Wis. Stat. §893.25, the state’s 20-year adverse possession statute.

More specifically, the Supreme Court reviews whether a party who publicly denies ownership in property may unwittingly acquire ownership through adverse possession, and whether this party’s successor in interest — who was told at the time of sale that they were not purchasing ownership to the property in question — may likewise be deemed an owner after all. The trial court answered no; the Court of Appeals reversed.

The titleholders of the property (the Estate of Ralph Hines, Estate of William J. Newman and Lake Delton Holdings, LLC) appealed to the Supreme Court. In reaching its decision, the Court of Appeals determined that several cases broadly pronounce that the subjective intent of parties is irrelevant. Yet at the same time, and seemingly inconsistently, the adverse possession statute, Wis. Stat. § 893.25(2)(a), requires “occupation under claim of title,” and several cases, at least superficially, indicate that subjective intent does matter.

Some background: In 1963, Ronald and Mary Soma purchased property separated from Lake Delton by the disputed lakefront strip. The Somas always understood that they did not own the lakefront strip. Nonetheless, from the beginning they took steps to exclude others, including putting up a “no trespassing” sign and telling people that the lakefront strip was private property.

The Somas mistakenly believed that the lakefront strip was owned by a company that operated the “Wisconsin Ducks” tours. When the Somas wanted to put out a pier from the lakefront strip, Ronald Soma asked for permission from a manager employed by the Wisconsin Ducks. Subsequently, in 1982, Wisconsin Ducks employees were making improvements to the lakefront strip, and the Somas asked for and received permission from the same manager to push some rocks to the water’s edge, bring in dirt, and plant grass seed on the lakefront strip.

Thereafter, acting under the mistaken impression that they had permission from the true owner to do so, the Somas mowed and otherwise maintained the lakefront strip as if they were the owners.

In 2002, the Somas sold their property to the Wilcoxes. At that time, Ronald Soma told the Wilcoxes that the sale did not include the lakefront strip because the Somas did not own the property.

Before the filing of the lawsuit that forms the basis for this appeal, neither the Somas nor the Wilcoxes knew the identities of the true titleholders. There is no evidence that the titleholders ever did anything with respect to the lakefront strip. The Wilcoxes also made landscaping improvements and maintained the lakefront strip.

Pursuant to Wis. Stat. § 893.25(2)(a) and (b), real estate is possessed adversely only if “the person possessing it, in connection with his or her predecessors in interest, is in actual



continued occupation under claim of title, exclusive of any other right,” and “[o]nly to the extent that it is actually occupied.” In addition, the property must be “protected by a substantial enclosure” or “usually cultivated or improved.” Pursuant to § 893.25(1), the adverse possession must be uninterrupted for 20 years.

Applying that standard to this case, the evidence showed that the Somas subjectively held the correct belief that they did not own the lakefront strip, and held the incorrect belief that their use of the property was with the permission of the true owner. Thus, it was undisputed that the Somas did not actually intend to possess the disputed property to the exclusion of the rights of others.

The trial court concluded that the Somas did not have hostile intent because they disclaimed ownership of the lakefront strip and asked for permission to make improvements. The trial court held that the fact that the Somas asked for permission to improve the property, albeit mistakenly from a non-owner, showed that the Somas had no intent that their actions be hostile to any ownership interest.

The Court of Appeals reversed, holding that the Somas’ subjective belief that they did not own the lakefront strip and had no intention of possessing it to the exclusion of others was irrelevant to the Wilcoxes’ adverse possession claim.

The Court of Appeals emphasized that what matters in evaluating the existence of a “hostile claim of title” is what is visible, not what is intended.

The titleholders argue in their petition for review that the Court of Appeals’ decision converts the Somas’ subjective belief and express declaration that they did not own the lakeside strip into an irrelevant indication of subjective intent. The titleholders argue that because the Somas expressly declared to the Wilcoxes that they did not own the lakefront strip and it was not included in the sale, the Somas did not occupy the strip under claim of title, and therefore, the Wilcoxes cannot tack the Somas’ time of possession onto that of the Wilcoxes in order to satisfy the adverse possession statute.

The Wilcoxes respond by insisting that this case merely applies the principle that, in adverse possession, the subjective intent of either party is irrelevant and the only issue is evidence of open and notorious occupation. They claim that the Somas’ statement to the Wilcoxes that they did not have title to the lakeside strip at the time of the sale in 2002 is “meaningless” to the adverse possession question.

A decision by the Supreme Court could clarify law in this area.

**WISCONSIN SUPREME COURT**  
**THURSDAY, DECEMBER 19, 2013**  
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Door County Circuit Court decision, Judge D. Todd Ehlers, presiding.*

2011AP1514

[Robert V. Kimble v. Land Concepts, Inc.](#)

This case arises out of a dispute over legal access to a home site in the town of Nasewaupée in Door County. The Supreme Court will examine whether a jury's \$1 million punitive damage award, which is 33 times the amount of the compensatory damages award, is sustainable.

Some background: Robert L. and Judith W. Kimble bought their homestead property in 2004. They knocked down an existing home and built a new one estimated to be worth about \$1.5 million. They assumed, as had a previous owner, that they had easement rights to a private drive that was the only improved access to their property. But an entity known as Land Concepts Inc. owned the land on which the private drive ran and had never granted easement rights to the Kimbles or their predecessors.

The Kimbles filed a lawsuit against various parties, including their title insurance provider, First American Title, after First American refused to cover any claim for lack of access and unmarketability due to lack of access.

Ultimately, the Kimbles reached a settlement with all of the parties except First American. As part of the settlement, the Kimbles agreed to transfer their interest in their claim against First American to John and Jane Stevenson, who had previously owned the property and still owned an adjacent property.

The Stevensons brought claims against First American for breach of contract, breach of fiduciary duty, and bad faith. Ultimately, a jury awarded the Stevensons \$50,000 in compensatory damages for First American's breach of contract and \$1 million in punitive damages for First American's bad faith.

First American asked the trial court to reconsider several issues, and the trial court agreed that the amount of compensatory damages should be reduced to \$29,738.49. However, it denied First American's other requests, including the argument that the punitive damages award was excessive.

First American appealed on a variety of issues, to no avail. The Supreme Court has granted review of the following issue: Whether the \$1,000,000 punitive damages award against First American Title Insurance Company violates the Wisconsin Constitution or the common law of the state of Wisconsin.